Les Gruen

July 7. 2022

Colorado Springs City Council
c/o City Clerk
30 South Nevada Street, Suite 101
Colorado Springs, CO 80903

Re: Appeal of Planning Commission Items AR DP 21-00813 and AR FP 21-00814

Dear Council President Strand and Council Members:

Urban Strategies represents one of the two Appellants of the city planning staff's administrative approval of a proposal to build a convenience store/gas station at the southeast corner of South Eighth and West Brookside Streets. Based on compelling written evidence and testimony, staff's ***administrative approval of a final plat and development plan was overwhelmingly reversed by Planning Commission*** on a 4-1 vote at its June 16th meeting. The Applicant, Kum & Go, L.C. (Kum & Go), has appealed Planning Commission's decision on the basis that it was, "erroneous and clearly contrary to law".

At the Planning Commission hearing and in its appeal, Kum & Go contended that because the proposed use is a "use by right" within the existing zone and because it is installing infrastructure - that would ordinarily be required as a condition of final plat approval - its application should be approved. *Planning Commission soundly rejected this argument.* The Commission found that a variety of factors contributed to the proposal being both incompatible and not harmonious with the surrounding neighborhood. Consequently, the application could not meet criteria necessary to approve either the final plat or the development plan and both applications were overwhelmingly denied.

(A Colorado Supreme Court case involving the City of Colorado Springs addressed this same issue. In *City of Colorado Springs v. Secure-Care Self Storage, Inc.* 10 P.3d 1244 (Colo 2000) the Court upheld the denial of a development plan although the development plan met all zoning requirements, but which the City has determined was incompatible and inharmonious with the surrounding neighborhood.)

Since Kum & Go is not disputing the findings of the Planning Commission, but is claiming the decision was, "erroneous and clearly contrary to law", City Council is asked to uphold Planning Commission's decision without any further hearing by Council.

Sufficient evidence has been presented to staff during the review stage of this application as well as prior to the Planning Commission hearing to justify the Commission's decision. Furthermore, there has been no substantive challenge of this material by Kum & Go. At this point, no new evidence should be allowed.

Prior to the Planning Commission hearing on the Kum & Go final plat and development plan, the Appellants sought and received guidance from city staff concerning the order of the Planning Commission hearing. This guidance was consistent with that outlined in City Council's *Rules and Procedures*. At the hearing, however, the Planning Commission Chair inadvertently modified the order of presentation in a manner that denied the Appellants any right of rebuttal. Fortunately, because of the outcome, this mix-up did not matter. Should Council determine it would like to hear these items, the Appellants at the Planning Commission hearing request equal time as Kum & Go because of the mix-up at Planning Commission.

If there is a City Council hearing on this item, I would like to make a presentation similar to that made at Planning Commission and then serve as a "master of ceremonies" for those opposed to this proposal. I'd like to next introduce my client, who in turn would like to introduce several of his tenants. I would also like to introduce the other Appellant at the Planning Commission hearing, a representative from the Ivywild Improvement Society (representing 1,800 households) and a representative from the Skyway Association (representing 1,200 households). There are a number of neighbors that would also like to share their concerns.

In summary, ***City Council is asked to uphold Planning Commission's decision to deny the Kum & Go final plat and development plan application***, without any further hearing. The Planning Commission's decision was well reasoned and entirely within the law. The development plan proposed could not meet the standards required by Colorado Springs ordinance 7.5.502.

Attached below for your review is a copy of the initial appeal of Staff's administrative approval. This document provides a detailed rationale of why the Kum & Go development proposal fails to meet the City's development plan and final plat review criteria.

Sincerely,

Les Gruen
President

Attch: Appeal of Administrative Approval of Final Plat and Development Plan

THE PLANNING & DEVELOPMENT DEPARTMENT
APPEAL TO CITY PLANNING COMMISSION

*Complete this form if you are appealing an **Administrative** decision to City Planning Commission.*

APPELLANT CONTACT INFORMATION:

Appellants Name: Urban Strategies, Inc Telephone: 719.227.7777
Address: 26 South Tejon Street, Suite 200 City Colo Spgs
State: Co Zip Code: 80903 E-mail: urbanstrategies@msn.com

PROJECT INFORMATION:

Project Name: Kum & Go Gas Station and Convenience Store
Site Address: SEC 8th Street and Brookside Street
Type of Application being appealed: Final Plat and Development Plan
Include all file numbers associated with application: AR DP-00813 and AR FP-00814
Project Planner's Name: Matthew Alexander
Hearing Date: Item Number on Agenda:

YOUR APPEAL SUBMITTAL SHOULD INCLUDE:

1. Completed Application
2. $176 check payable to the City of Colorado Springs
3. Appeal Statement.
    - See page 2 for appeal statement requirements.

Submit **all** 3 items above to the **Land Use Review office (30 S Nevada, Suite 105, Colorado Springs, CO 80903)**. Appeals are accepted for 10 days after a decision has been made. Submittals must be received no later than 5pm on the due date of the appeal. Incomplete submittals and / or submittals received after 5pm or outside of the 10 day window will not be accepted. If the due date for the submittal falls on a weekend or federal holiday, the deadline is extended to the following business day.

If you would like additional assistance with this application please contact the Land Use Review office at 385-5905.

APPELLANT AUTHORIZATION:

The signature(s) below certifies that I (we) is(are) the authorized appellant and that the information provided on this form is in all respects true and accurate to the best of my (our) knowledge and belief. I(we) familiarized myself(ourselves) with the rules, regulations and procedures with respect to preparing and filing this petition. I agree that if this request is approved, it is issued on the representations made in this submittal, and any approval or subsequently issued building permit(s) or other type of permit(s) may be revoked without notice if there is a breach of representations or conditions of approval.

L. W. Green — Signature of Appellant

27 May 2022 — Date

Urban Strategies
Letter to City Council

THE APPEAL STATEMENT SHOULD INCLUDE THE FOLLOWING

- ☐ If you are appealing a decision made Administratively the following should be included in your appeal statement:
  1. Verbiage that includes justification of City Code 7.5.906.A.4
     - i. Identify the explicit ordinance provisions which are in dispute.
     - ii. Show that the administrative decision is incorrect because of one or more of the following:
       1. It was against the express language of this zoning ordinance, or
       2. It was against the express intent of this zoning ordinance, or
       3. It is unreasonable, or
       4. It is erroneous, or
       5. It is clearly contrary to law.
     - iii. Identify the benefits and adverse impacts created by the decision, describe the distribution of the benefits and impacts between the community and the appellant, and show that the burdens placed on the appellant outweigh the benefits accrued by the community.

CITY AUTHORIZATION:

Payment: $_____ Date Application Accepted:_____

Receipt No: _____ Appeal Statement:_____

Intake Staff:_____ Completed Form:_____

Assigned to:_____

Les Gruen

May 27, 2022

Mr. Matthew Alcuran
Planner II, Northeast Team
Development Review Enterprise
2880 International Circle, #220-7
P.O. Box 1575, MC 1378
Colorado Springs, CO 80901

Via email at: Matthew.Alcuran@coloradosprings.gov and Hand Delivery

Re: Appeal Statement of Administrative Approval of AR DP-00813 and AF FP-00814

Dear Mr. Alurcan:

Urban Strategies, Inc. is appealing the administrative approval of the above referenced items on behalf of 352 LLC, the owner of the 10-unit Brookside Garden apartment property immediately adjacent to the subject property on the east. Tenants typically are lower income, in some cases disabled, and frequently long-tenured because of reasonable rents and well maintained grounds. Similarly located and priced options are extremely scarce. 352 LLC also owns a single-family home on the north side of Brookside Street directly across the street from the subject site.

The Appellant believes that staff's administrative approval of the proposed Kum & Go gas station and convenience store final plat and development plan application (development proposal) was incorrect because this decision was:

- against the express language of the zoning ordinance, specifically 7.7.303.B.1 and 7.5.502.E.1, 2, 7, 13
- against the express intent of the zoning ordinance specifically 7.7.303.B.1 and 7.5.502.E.1, 2, 7, 13
- unreasonable
- erroneous

Contrary to the justification provided by the Applicant and determination of the planning staff, this application does not meet the statutory approval criteria for a development plan which requires meeting the intent of the zoning code, consistency with the zoning code and compatibility with the land uses surrounding the site. This application further fails to meet various final plat review criteria requirements including:

URBAN STRATEGIES, INC. / Six South Tejon Street / Suite 550 / Colorado Springs, Colorado 80903 / Tel 719.227.7777 / Fax 719.227.7778
Email urbanstrategies@msn.com / www.urbanstrategiesinc.net

- Promoting the health, safety, convenience and general welfare of the citizens of the city
- Encouraging the development of sound, economical, stable neighborhoods and create a healthy living environment for the residents of the city in conformance with the goals and policies of the Comprehensive Plan
- Provide for adequate law enforcement and fire protection facilities
- Ensure the appropriate development of the community through the implementation and goals and policies of the Comprehensive Plan

Applicant's Justification

The Applicant justifies its request by suggesting its facility:

- "sets itself apart from its competition"
  - food
  - jobs
  - gas
  - taxes
- market research identifying demand for more gas pumps
- would make the subject site safer
- "keep an established neighborhood and promote existing land uses"
- improve traffic congestion, upgrade utilities and pedestrian circulation

Appellant's Response to Applicant's Justification

For most people gas stations are not a destination, but a commodity. Notwithstanding the applicant's claims, there is little to differentiate its product from other similar businesses.

Any market research identifying the need for more gas pumps in this area is not a justification for project approval under the zoning code.

The Applicant's contention that the subject site has "experienced frequent criminal activities" cannot be substantiated. "Heatmaps" showing criminal activity are not site specific and consist primarily of traffic citations at one of the city's speed traps. Therefore the notion that the applicant's facility will make the property safer also cannot be substantiated. In fact, common sense would suggest the neighborhood would be exposed to more frequent criminal activities if this appeal is unsuccessful.

It is hard to understand how this proposal "keeps an established neighborhood and promotes existing land uses". While the proposed use is consistent with existing zoning, the ***intensity of use*** is what makes this application inconsistent with zoning requirements.

The subject site has historically been a commercial use occupied during normal business hours with limited customer traffic. The proposed use would be 24 hours per day/365 day per year with continuous customer traffic.

As will be discussed in greater detail below, undertaking required infrastructure improvements should not be considered justification for approval.

Staff's Justification

Staff in an email to Urban Strategies dated May 19, 2022 (attached) justifies its administrative approval as follows:

"Planning staff has determined that the Kum & Go gas station Development Plan project meets the applicable review criteria and the City's PlanCOS Comprehensive Plan intention, vision, and policies of the Plan. The PlanCOS Comprehensive Plan Vision Map shows that the development proposal fits into the overall community framework because the project location is within an Established Traditional Neighborhood and the goal of this neighborhood typology is to recognize, support, and enhance the existing character of the neighborhoods, while supporting their ongoing investment and improved adaption. Currently, there is no curb, gutter or sidewalk along the project frontage on W. Brookside Street. The development proposal will enhance and improve the area by installing new curb, gutter and sidewalk, which will also meet ADA accessible standards. The development proposal meets the Traditional Neighborhood recommendation to enhance walkability features because of the new off-site street improvements.

In addition, the PlanCOS Comprehensive Plan Neighborhood Framework shows the project site is within the Established Traditional Neighborhood and per Policy VN-3.C, (Promote neighborhood-level shopping and service options that increase local access and walkability) the development proposal supports this policy because the removal of the five (5) existing parking spaces including one (1) ADA parking space along S. 8th Street is included in the development plan set. The development plan set also indicates a new drive access along S. 8th Street and one on W. Brookside Street with both meeting City Engineering standards.

Planning staff finds that the development proposal is consistent with the goals and objectives of the PlanCOS Comprehensive Plan."

Appellant's Response to Staff Justification

The proposal for a large, modern gas station and convenience store does nothing to "recognize, support or enhance the existing character" of the historic Ivywild neighborhood, which is categorized as an Established Traditional Neighborhood in the city's Comprehensive Plan. The only similar facility in the entire Ivywild neighborhood is the Maverik gas station and convenience store that is located at the opposite corner of the neighborhood (1.0 miles away) adjacent to interstate on-ramps and off-ramps. According to city of Colorado Springs traffic data, the average daily traffic count at the intersection of 8th and Brookside Streets is 5,224, compared to 10,379 at the intersection of Tejon Street and Motor City Drive.

Could staff provide examples of how this proposal "recognizes, supports and enhances the existing character of Ivywild"? The Appellant is unable to do so.

Staff seems to be suggesting that an applicant undertaking utility, drainage, curb & gutter, sidewalk and other public safety improvements **that are required** under the city's subdivision regulations *automatically* complies with all comprehensive plan and zoning code requirements. For the record, curb, gutter and sidewalk already exist along the east side of 8th Street where there is currently pedestrian access. There is minimal pedestrian traffic along the south side of Brookside Street and it is unlikely to increase dramatically on account of a new sidewalk or the presence of a Kum & Go. There is curb and gutter, but not sidewalk in front of my client's property at 619-623 West Brookside Street. The practical effect of installing a sidewalk on the north side of the subject property is that it is unlikely to promote pedestrian traffic because there is not a sidewalk it connects with.

If approved, the increase in the intensity of use of this site – even with curb, gutter & sidewalk improvements installed – is likely to exacerbate, not ameliorate, congestion and conflicts at the intersection of 8th and Brookside Streets over what currently exists due to cars and trucks entering and exiting the site.

The Appellant strongly disagrees that this development proposal is consistent with the goals and objectives of the PlanCOS Comprehensive Plan and cannot envision how a development proposal could be more inconsistent with PlanCOS.

What was not included in the above referenced PlanCOS Policy to "promote neighborhood-level shopping and service options, while supporting their ongoing investment…." [VN3.C], as noted by Staff in its approval was that service options specifically referenced "healthy food markets, coffee houses, restaurants". A gas station and convenience store is not neighborhood level shopping and is not likely to achieve the goal of increasing local walkability. Further, any new pumps added at this location are likely to siphon business from surrounding businesses. Therefore, if approved, a new, out-of-town business could potentially harm older local businesses.

This development proposal is inconsistent with the following PlanCOS Goals and Policies and therefore does not meet approval criteria required by the zoning code:

- **Policy UP-1A**: Emphasize placemaking throughout the city with design and programming that supports a distinctive identity and experience
- **Goal UP – 2**: Embrace thoughtful, targeted, and forward-thinking changes in land use, infill....
- **Policy UP-4.A**: Actively plan and encourage a development pattern consisting of unique centers located along new and redeveloped corridors....
- **Policy UP-4.B**: Within unique centers, incorporate density and mixed uses along with higher standards of design, attention to the public realm....
- **Policy UP-4.C**: Ensure that the City Zoning Code supports the intent of unique places.
- **Policy UP-5.A**: Actively evaluate plans for existing, new and redeveloping urban places and corridors from the perspective of fiscal and environmental sustainability.
- **Policy VN-3-A**: Preserve and enhance the physical elements that define a neighborhood's character.
- **Policy VN-3-C**: Promote neighborhood-level shopping and service options to include a variety of healthy food markets, coffee houses, restaurants and other supportive businesses that increase local access and walkability
- **Policy VN-3.E**: Encourage and support the integration of mixed-use development in neighborhoods.

<u>Minimal Benefit Versus Massive Adverse Impact</u>

Administrative approval of the Kum & Go final plat and development plan provides minimal benefit yet creates significant adverse impact.

The approval of this development proposal benefits:

- Two property owners selling to Kum & Go
- Any brokers representing the sellers

- The Kum & Go company and investor that is financing this location
- Key Bank – to the extent they are getting paid to vacate its easement
- Anyone that believes there are insufficient gas and convenience stores in the proximate area and desires a Kum & Go or similar store at that location

The approval of this development proposal creates the following significant adverse impacts:

- Compromises the health, safety, convenience and general welfare of those living in the Brookside Garden Apartments and surrounding neighborhood
    - Substantial change in intensity of use of the site
        - Hours of operation
        - Traffic
        - Noise
        - Light
        - Potential for environmental pollution that didn't exist previously
        - Potential for drainage issues if 100-year flood events are exceeded
- Compromises the real estate values of the Brookside Garden Apartments and surrounding residential properties
- Contributes to potential fire danger to vacant Center for Creative Leadership property across 8th Street from subject property and surrounding area
- Pattern of undesirable behaviors associated with similar facilities (i.e., recent murder at Fountain Kum & Go. Overdoses in bathrooms.)

In summary, the benefits that accrue from this project are extremely limited in the number of individuals benefited and the scope of benefit, while those that are adversely affected are numerous within and beyond the immediate vicinity and Ivywild neighborhood.

Note that any new employment or taxes generated by this proposed facility is likely to come from other businesses. There will be no net gain to the community in jobs or sales tax.

Conclusion

If the zoning code and especially PlanCOS are to be meaningful and useful there needs to be some discrimination and proportion in the review of development plan applications. Keeping Colorado Springs a great city will require more than approving every project that is a use by right within a particular zone, that submits a plan with the north arrow in the correct location with all the t's crossed and i's dotted, and a willingness to install required public safety and infrastructure improvements.

There's nothing fundamentally bad about Kum & Go gas station and convenience stores. The problem, in this case, is the incompatibility of this proposal with the surrounding area. This incompatibility is why the Appellant argues the Planning Commission should overturn the administrative approval of the Kum & Go final plat and development plan.

Section 7.7.303.B.1 of the city code requires that any "proposed subdivision meet all requirements of the Subdivision Code and any other applicable City policies, standards and ordinances". This development proposal fails to meet the express letter and the express intent of numerous PlanCOS policies as discussed previously.

Section 7.5.502.E.1 of the city code requires that, "the use, site design, building location, orientation and exterior building materials are compatible with the surrounding neighborhood, buildings and uses". Evidence and testimony from the Appellants has shown this development proposal is not compatible with the surrounding environment. Therefore, this development proposal fails to meet the express letter and the express intent of the zoning ordinance.

Section 7.5.502.E.2 of the city code requires that the, "development plan substantially complies with any City-adopted plans...." . The Appellant has tried to show that this development proposal is not in alignment with PlanCOS at the minimum. Therefore, this development proposal fails to meet the express letter and the express intent of the zoning ordinance.

Section 7.5.502.E.7 of the city code requires that, "the project provides landscaped areas, landscape buffers and landscape materials as set forth in this chapter and the Landscape Design Manual". The Applicant has sought and staff has granted a variance to a critical landscape buffer along the eastern edge of the subject property adjacent to my client's property. This property is among the most affected by the proposed development and no variance should have been granted to eliminate any crucial screening of a high intensity commercial use from a long-time residential neighbor. If this project is approved, a high retaining wall along the east property line raises the elevation of the driveway even with the bedroom windows of the apartments located at 623 West Brookside. (In fact, an additional landscaping buffer should be required if this development proposal moves forward since most trees do not have low bushy branches to prevent airborne pollutants traveling 20 feet to the tenant's windows.) Therefore, this development proposal fails to meet the express letter and the express intent of the zoning ordinance.

Section 7.5.502.E.13 of the city code requires that, "significant off-site impact reasonably anticipated as a result of the project are mitigated or offset....". Based on a known history of undesired behaviors associated with uses of the type proposed and the potential for increased criminal activity and the potential for enhanced fire danger, there has not

been sufficient mitigation or offset as required by code. Therefore, this development proposal fails to meet the express letter and the express intent of the zoning ordinance.

Because the foregoing review criteria were not adequately considered or incorporated into staff's decision, Appellant believes the administrative approval of this development proposal was unreasonable and erroneous in addition to not meeting the express letter and express intent of the zoning ordinance.

Consequently, the Appellant requests staff's administrative approval of these items be overturned by the Planning Commission.

Respectfully,

Les Gruen
President
Urban Strategies, Inc.

attchs: Completed City of Colorado Springs Appeal to City Planning Commission Form Application
$176 check payable to the City of Colorado Springs
Appeal Statement
May 20, 2022 email from Alcuran to Gruen

kum&goappeal052722

From: **Alcuran, Matthew** Matthew.Alcuran@coloradosprings.gov
Subject: RE: Brookside Easement
Date: May 19, 2022 at 12:30 PM
To: Les Gruen urbanstrategies@msn.com
Cc: Clay Taylor bluewildrye@gmail.com

Good afternoon Mr. Gruen,
Thank you for the update regarding the private access easement. In addition, Planning staff has determined that the Kum & Go gas station Development Plan project meets the applicable review criteria and the City's PlanCOS Comprehensive Plan intention, vision, and policies of the Plan.
The PlanCOS Comprehensive Plan Vision Map shows that the development proposal fits into the overall community framework because the project location is within an Established Traditional Neighborhood and the goal of this neighborhood typology is to recognize, support, and enhance the existing character of the neighborhoods, while supporting their ongoing investment and improved adaption. Currently, there is no curb, gutter or sidewalk along the project frontage on W. Brookside Street. The development proposal will enhance and improve the area by installing new curb, gutter and sidewalk, which will also meet ADA accessible standards. The development proposal meets the Traditional Neighborhood recommendation to enhance walkability features because of the new off-site street improvements.
In addition, the PlanCOS Comprehensive Plan Neighborhood Framework shows the project site is within the Established Traditional Neighborhood and per Policy VN-3.C, (Promote neighborhood-level shopping and service options that increase local access and walkability) the development proposal supports this policy because the removal of the five (5) existing parking spaces including one (1) ADA parking space along S. 8th Street is included in the development plan set. The development plan set also indicates a new drive access along S. 8th Street and one on W. Brookside Street with both meeting City Engineering standards.
Planning staff finds that the development proposal is consistent with the goals and objectives of the PlanCOS Comprehensive Plan.
Best,

Matthew Alcuran
Planner II ! South Team
Phone: 719-385-7347
Email: matthew.alcuran@coloradosprings.gov
Land Use Review Division
Planning & Community Dev.
City of Colorado Springs
30 South Nevada Avenue, Suite 701
Colorado Springs, CO 80903
PlanCOS
LEADING THE WAY TO
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Links:
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Please consider the environment before printing this e-mail.

-----Original Message-----
From: Les Gruen <urbanstrategies@msn.com>
Sent: Wednesday, May 18, 2022 10:06 AM
To: Alcuran, Matthew <Matthew.Alcuran@coloradosprings.gov>
Cc: Clay Taylor <bluewildrye@gmail.com>
Subject: Brookside Easement

Good morning, Matt -

I wanted to let you know that our further research led us to conclude that my client's property does not, in fact, benefit from any easements on the adjacent property.

While our objection to the Kum & Go final plat based on this specific item is no longer relevant we continue to oppose both the final plat and development plan since neither conforms to required review criteria

Thank you.

Les.

COLORADO SPRINGS
OLYMPIC CITY USA

Return to Fee Calculator

City of Colorado Springs
Planning Department
Fee Receipt

Application	Department	Amount	Applicant	AnnexDisc
Appeal of Administrative Decision	Land Use Review	$176.00		
Total Fees		$176.00		

Intake Staff:	Ethan Shafer
Date:	5/27/2022
Planner:	Matthew Alcuran
Receipt Number:	41193
Check Number:	3386
Amount:	$176.00
Received From:	Urban Strategies, Inc. - SEC of 8th St and Brookside

Urban Strategies
Letter to City Council